85-226

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

* * * * * *

NO. _____

* * * * * *

WILLIE B. HACKETT,

Petitioner

vs.

HOUSING AUTHORITY OF THE
CITY OF SAN ANTONIO, TEXAS,
A BODY POLITIC INCORPORATE,

Respondent

* * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * * *

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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY SANCTIONING THE DISTRICT COURT'S RELIANCE ON INCOMPETENT EVIDENCE TO DEFEAT PETITIONER'S PRIMA FACIE CASE OF RACIAL DISCRIMINATION IN CONTRAVENTION OF THIS COURT'S DECISIONS IN UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS V. ATKINS AND TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, WHICH REQUIRE THE DEFENDANT TO PRODUCE ADMISSIBLE EVIDENCE.

2. WHETHER UNDER THIS COURT'S DECISION IN UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS V. ATKINS, THE COURT OF APPEALS MAY REQUIRE DIRECT EVIDENCE OF DISCRIMINATORY INTENT TO ESTABLISH A VIOLATION OF THE FAIR HOUSING ACT, WHERE SUCH REQUIREMENT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

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IN THE

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WILLIE B. HACKETT,

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vs.

HOUSING AUTHORITY OF THE
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A BODY POLITIC INCORPORATE,

Respondent

* * * * * *

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * * * * *

WILLIE B. HACKETT, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause on January 21, 1985.

OPINION BELOW

The opinion of the Court of Appeals is reported at

750 F.2d 1308 and is printed in the Appendix. The opinion of the District Court below was not reported.

JURISDICTION

The opnion of the Court of Appeals for the Fifth Circuit was entered on January 21, 1985. A timely petition for rehearing was denied March 7, 1985, and this Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

EXISTENCE OF JURISDICTION BELOW

The District Court for the Western District of Texas at San Antonio had jurisdiction over this case under 42 U.S.C. §1981, 42 U.S.C. §1982, 42 U.S.C. §1983, and 42 U.S.C. §3612.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

42 U.S.C. §3601, declaration of policy:

It is the policy of the United States to provide, within Constitutional limitations, for fair housing throughout the United States.

42 U.S.C. §3604(a) and (b):

...It shall be unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race. . .to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race...

42 U.S.C. §3612, enforcement by private persons:

(a) ...The rights granted by Section 3603-3606 may be enforced by civil actions in appropriate United States District Courts without regard to the amount in controversy...

42 U.S.C. §3617:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by Section 3603,

3604, 3605, or 3606. This section may be enforced by appropriate civil action.

Rule 1006, Summaries:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The pertinent provisions of 24 C.F.R. §882.106(a)(b) and §882.108(b) are set forth in the Appendix.

STATEMENT OF THE CASE

From 1961 to 1970, Petitioner, WILLIE B. HACKETT, purchased and renovated houses in the Carson Homes area, a predominantly black neighborhood. (R. Vol. 1, 2, 32, Hackett v. Housing Authority of City of San Antonio, 750 F.2d 1308, 1309 (5th Cir. 1985). In 1975, the Petitioner began participating in the Section 8 leased housing program administered by the Defendant, The Housing Authority of the City of San Antonio. (R. Vol. 1, 32).

In 1981, Defendant set rent limitations on Petitioner's property (R. Vol. 1, 42, 43; Plaintiff's

Exhibit C). Prior to these rent reductions, amenities provided and improvements made by Petitioner were documented to justify the higher rent payments. (R. Vol. 1, 103-104). Factors in determining reasonableness of rent payments include: on-site management, maintenance, facilities, amenities, and location. (R. Vol. 1, 68-69; Vol. 2, 38-42); 24 C.F.R. Sec. 882.106(b) (1984). The Petitioner or a family member maintained 24-hour on-site management, while other landlords did not (R. Vol. 1, 30, 60-61, 125-126), and the Petitioner also provided refrigerators and stoves, most of them new (R. Vol. 1, 35-36), when some owners did not (R. Vol. 2, 34-35). Other amenities provided by the Petitioner included paneling, carpeting, tile, storm doors, and siding. (R. Vol. 1, 36). Petitioner also tried to improve the neighborhood by organizing a tenants association and a security patrol. (R. Vol. 1, 34).

Defendant's chief inspector, Rod Fauser, believed the Carson Homes area was badly in need of rehabilitation. (R. Vol. 1, 148). Petitioner desired to improve his units (R. Vol. 1, 30-35; Plaintiff's Exhibit 24) and upgrade the neighborhood (R. Vol. 1, 34-35; Defendant's Exhibit E). In fact, before rent limitations were set on

Petitioner's property, the acting director of leased housing noted that, "The fact that your units are, in appearance, above average for your particular area was a consideration in making our rent determination". (Defendant's Exhibit E at 2).

Defendant has 6,000 units all over the city, but the maximum rent is not the same for all parts of the city. (R. Vol. 1, 155, 161-162). The east side, a predominantly black area, which includes the Carson Homes area and Petitioner's properties, received the lowest average rent payments in the Section 8 program. (R. Vol. 1, 170-171; Vol. 2, 30). Nevertheless, when Rod Fauser became the chief inspector for leased housing, he concluded that rent payments for the Carson Homes area were too high. (R. Vol. 1, 163-164). In arriving at this conclusion, Mr. Fauser did not conduct a scientific analysis of the property or the owner's investment, but merely "eyeballed the property and talked to a few people". (R. Vol. 2, 61). Furthermore, Mr. Fauser never contacted the HUD Field Office data appraiser or an independent appraiser to evaluate the homes in this area. (R. Vol. 2, 49-50).

Petitioner was the only landlord to receive a letter setting rent limitations. (R. Vol. 1, 130; Vol. 2, 24;

Plaintiff's Exhibit 13). No other landlord was given a schedule of rent ceilings. (R. Vol. 2, 57). Defendant admitted disparate treatment of Petitioner in one instance where a white landlord was paid higher rent than Petitioner for property which was across the street from one of the Petitioner's houses. (R. Vol. 1, 123-124). The Defendant, however, explained this was a mistake. (R. Vol. 1, 132-133; Vol. 2, 27-28). Later, leased housing cancelled its contract with this white landlord because he failed to maintain the property and make required repairs. (R. Vol. 1, 125).

The District Court relied on Exhibit Z, a summary prepared by Defendant, in finding that Defendant had not discriminated against Petitioner on the basis of race in establishing rent payments. (R. Vol. 2, 92-93). Exhibit Z purports to show the average rent payments made to Anglo, Hispanic and Black participant owners in Census Tracts 1306 and 1307. Petitioner's properties are located in Census Tract 1307. Exhibit Z is divided into two parts: a study prepared on December 1, 1982, and a study prepared on September 30, 1983, for rent periods from 1980 through 1984. Although the Defendant has 6,000 units in the leased housing program, Exhibit Z only

includes 150 units in a limited geographic area. (R. Vol. 1, 134; Exhibit Z).

Data is presented by street location, bedroom size, and owners' ethnic backgrounds. Since Defendant does not maintain ethnic statistics on owners, the preparer of Exhibit Z relied on three alleged owners to identify the black participants. (Exhibit Z). There was no indication as to how the ethnic classification of other owners was determined.

Although Petitioner made a timely objection to admission of Exhibit Z and demanded access to the source materials, the documents and records underlying the Exhibit Z summary were never introduced into evidence or made available to Petitioner. (R. Vol. 1, 9). Without access to the underlying documents, both the District Court and Petitioner were unable to ascertain all deficiencies, inconsistencies and errors in Exhibit Z. Nevertheless, Petitioner objected to the admission of Exhibit Z on the ground that it was replete with errors, some of which were obvious on the face of the document.

The District Court relied on Exhibit Z in reaching its ultimate conclusion of no discrimination. In rendering his decision, the District Judge stated:

"...This ain't a discrimination case, and I find principle (sic) support for this in Defendant's Exhibit Z, particularly the inter-office memo of December 1, 1982 from Fauser to Bass. I rely upon it. I believe it is accurate and relevant." (R. Vol. 2, 92; Hackett, 750 F.2d 1308, 1312).

The Court of Appeals affirmed, holding that even though the District Court had abused its discretion in receiving and considering Exhibit Z, the erroneous submission did not require a new trial. Hackett, 750 F.2d 1308. A timely petition for rehearing was denied on March 7, 1985.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS V. AIKENS AND TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, WHICH REQUIRE THE DEFENDANT TO PRODUCE ADMISSIBLE EVIDENCE TO REBUT PLAINTIFF'S PRIMA FACIE CASE OF RACIAL DISCRIMINATION.

In the present case, the Court of Appeals found that Petitioner demonstrated some basis for inferring discrimination. Hackett v. Housing Authority of City of San Antonio, 750 F.2d 1308, 1313 (5th Cir. 1985). Defendant primarily relied on Exhibit Z to rebut Petitioner's prima

facie case of racial discrimination. The Court below held that the District Court abused its discretion in receiving and considering Defendant's Exhibit Z because it was inadmissible hearsay, irrelevant, and Defendant had failed to provide the underlying documents pursuant to Rule 1006. Hackett, 750 F.2d at 1312.

Nevertheless, the Court of Appeals in Hackett held that such erroneous admission of incompetent evidence did not require a new trial because other evidence sufficiently undergirded the District Court's finding of no discrimination. Hackett, 750 F.2d at 1314.

The District Court, however, did not merely receive and consider Exhibit Z, but actually relied on this incompetent evidence, not the other evidence, in reaching its ultimate decision of no discrimination. Hackett, 750 F.2d at 1312; R. Vol. 2, 92-93.

Moreover, Petitioner objected to the other documentary evidence on the same grounds as the objections to Exhibit Z, but the focus of the appeal was on Exhibit Z because it formed the basis of the District Court decision. Hackett, 750 F.2d at 1312.

The probative value of Exhibit Z and other documentary evidence depended entirely on the accuracy of

comparisons of rents paid to owners in each ethnic classification. Thus, assurance that amount of rent, identification of owners, unit size, location, and rent periods were correct was essential to the validity of Defendant's rebuttal. Yet, Exhibit Z and other documentary evidence contain serious and substantial errors in each of these categories.

The Court of Appeals in Hackett correctly noted that,

> "Since excising the racial indicia from Exhibit Z would have vitiated its relevance in rebutting the claim of discrimination, the inclusion of hearsay in the Exhibit made it largely irrelevant." Hackett, 750 F.2d at 1312.

Nevertheless, this unfounded hearsay was relied on by the District Court to defeat Petitioner's claim, without giving Petitioner an opportunity to cross-examine and introduce controverting evidence. Since the documents underlying Exhibit Z, a summary, were never produced, the Petitioner was unable to conduct meaningful cross-examination of Defendant to attack the validity of the procedures employed in compiling the summary or to fully expose its unreliability. See, Wright v. Southwest Bank, 554 F.2d 661, 664 (5th Cir. 1977), after remand, 648 F.2d

266, 267 (5th Cir. 1981) (in view of trial court's reliance on incompetent evidence, case remanded to allow plaintiff opportunity to cross-examine and introduce controverting evidence).

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, this Court stated that once plaintiff raises an inference of discrimination, the burden then shifts to defendant to rebut the presumption by clearly setting forth, through the introduction of admissible evidence, nondiscriminatory reasons for the challenged actions. Id., at 254-255. Thus, Defendant cannot meet its burden merely through an articulation not admitted into evidence. Id., at 255, n. 9. Likewise, erroneously admitted evidence cannot suffice. See, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) (to rebut presumption of discrimination, defendant must produce admissible evidence).

Yet, in the present case the Court of Appeals sanctioned the District Court's reliance on incompetent evidence to defeat Petitioner's prima facie case of racial discrimination. To permit such reliance would effectively undermine the objectives of the Fair Housing Act by allowing Defendant to use any evidence regardless

of its reliability to defeat Plaintiff's claim. See, Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1040 (2nd Cir. 1979) (to permit fair housing claim to be defeated by defendant relying on hypothetical reasons would nullify the Act).

2. UNDER THIS COURT'S DECISION IN UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS V. AIKENS AND OTHER COURT OF APPEALS DECISIONS IN TITLE VIII CASES, DISCRIMINATORY EFFECT IS SUFFICIENT TO ESTABLISH A VIOLATION OF THE FAIR HOUSING ACT AND ONLY CIRCUMSTANTIAL EVIDENCE OF DISCRIMINATORY INTENT IS REQUIRED.

The decision below should be reviewed because it misapplies the requirements of the Fair Housing Act and cases construing the Act in conflict with this Court's decision in United States Postal Service Board of Governors v. Atkens, 460 U.S. 711 (1983), as well as the decisions of other Courts of Appeals.

The court below held that admission of Defendant's Exhibit Z was harmless error, in spite of the District Court's reliance on this incompetent evidence, because Petitioner "produced no direct evidence of intentional discrimination; yet his claim stood or fell on his

ability to show that the SAHA treated him differently from non-black Section 8 landlords". Hackett v. Housing Authority of City of San Antonio, 750 F.2d 1308, 1313 (5th Cir. 1985).

In Atkens, this Court remanded the case because the District Court had erroneously held that Plaintiff was required to submit direct evidence of discriminatory intent. 460 U.S. 711 (1983). Although Atkens involved a Title VII rather than a Title VIII action, several Circuit Courts have noted the similarities between these two statutes and have applied Title VII standards to Title VIII cases. Betsey v. Turtle Creek Associates, 736 F.2d 983, 987 (4th Cir. 1984); Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1037 (2nd Cir. 1979); Resident Advisory Board v. Rizzo, 564 F.2d 126, 147 (3rd Cir. 1977); Smith v. Anchor Building Corporation, 536 F.2d 231, 236 (8th Cir. 1976).

Thus, many Circuit Courts have held that discriminatory impact or effect is sufficient to establish a violation of the Fair Housing Act. Betsey v. Turtle Creek Associates, 736 F.2d 983, 987 (4th Cir. 1984); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2nd

Cir. 1979); Metropolitan Housing Development Corporation v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied 434 U.S. 1025 (1978); Resident Advisory Board v. Rizzo, 564 F.2d 126, 147 (3rd Cir. 1977); Smith v. Anchor Building Corporation, 536 F.2d 231, 233 (8th Cir. 1976).

> "...The stated congressional purpose demands a generous construction of Title 8. The Supreme Court has noted the need to construe both Title VII and Title VIII broadly so as to end discrimination. Resident Advisory Board v. Rizzo, 564 F.2d at 147 (citing Griggs v. Duke Power Company, 401 U.S. 424 [1971]; Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205 [1972])."

Therefore, the decision of the court below requiring direct evidence of intentional discrimination conflicts with this Court's broad construction of Title VIII cases and the underlying objectives of the Fair Housing Act to effectively eliminate all traces of racial discrimination in the housing field. Trafficante v. Metropolitan Life Insurance Company, 409 U.S. at 211.

A facially neutral policy or decision can produce two types of racially discriminatory effects: first, the decision may have a greater adverse impact on one racial group than on another; and, second, the decision may have a pejorative effect by perpetuating existing patterns of

segregation and preventing interracial association. Metropolitan Housing Development Corporation v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied 434 U.S. 1025 (1978).

Relying on geographic location to limit rental payments is a seemingly innocuous and facially neutral policy decision supported by real estate practice and custom. Nevertheless, rent ceilings placed on a predominantly black area but not on other areas have a greater adverse impact on the black tenants and owners in the affected area.

> "It is, therefore, the obligation of the Courts to look beyond the form of a housing transaction and proscribed practices which actually result in racial discrimination. [Citation omitted.] Effect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme." Smith v. Anchor Building Corporation, 536 F.2d 231, 233 (8th Cir. 1976) (citing United States v. City of Blackjack, 508 F.2d 1179, 1185 [8th Cir. 1974], cert. denied, 422 U.S. 1042 [1975]; Williams v. Matthews Company, 499 F.2d 819, 825 [8th Cir.], cert. denied, 419 U.S. 1021 [1974]).

Therefore, rent ceilings placed on the Petitioner's area constituted a discriminatory administration of a seemingly neutral policy and, as such, violated the Fair Housing Act. See, Smith v. Anchor, 536 F.2d at 235-236

(an arbitrary and unnecessary housing practice must be removed where it operates to discriminate on the basis of race).

Moreover, even if proof of discriminatory intent is required, circumstantial, rather than direct, evidence may be used to establish the requisite intent because explicit statements of motivation can rarely "be captured for purposes of proving racial discrimination". Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1064 (4th Cir. 1982); see also, Resident Advisory Board v. Rizzo, 564 F.2d at 146 (Title VIII rights may be enforced without direct evidence of discriminatory intent).

In United States Postal Service Board of Governors v. Atkens, this Court clearly indicated that a discrimination plaintiff need not submit direct evidence of discriminatory intent. 460 U.S. 711; see also, Krodel v. Young, 748 F.2d 701, 707 (D.C. Cir. 1984) (discrimination plaintiffs almost necessarily have to rely on indirect evidence).

In Texas Department of Community Affairs v. Burdine, this Court stated that although plaintiff retains the burden of persuasion, he may succeed by either directly persuading the Court that a discriminatory reason

motivated defendant or indirectly by showing that the defendant's proferred explanation is unworthy of credence. 450 U.S. at 256. In the present case, the court below agreed with Petitioner that Exhibit Z was not relevant in rebutting the claim of discrimination. Hackett at 1312, but noted that the District Court had credited the Defendant's testimony that the one admitted instance of disparate treatment was a mistake. Hackett, at 1313. Nevertheless, this testimony only explains one example, not the other examples of disparate treatment. Furthermore, this alleged mistake does not explain why rent ceilings were placed on the predominantly black area and not other areas of the city; nor does it explain why the Petitioner was the only landlord to receive a letter regarding these rent limitations.

Although the District Court made no "explicit findings" regarding these rent limitations, the court below found that these limitations were guidelines made in response to the Petitioner's numerous complaints concerning disparate treatment. Hackett, at 1314, n. 4. In doing so, the court below went behind the stated basis of the District Court's judgment in an effort to justify the District Judge's abuse of discretion in relying on

inadmissible evidence. Moreover, the court below attempts to justify the rent limitations and frequent inspections endured by Petitioner as legitimate responses to the Petitioner's complaints of disparate treatment, Hackett, at 1314, n. 4, which only compounds the discrimination against the Petitioner by singling him out from other Section 8 landlords, but does not overcome the circumstantial evidence of discrimination.

In conclusion, requiring the Petitioner to produce direct evidence of intentional discrimination, while allowing Defendant to rebut Petitioner's inference of discrimination with incompetent evidence, places an insurmountable burden on the Title VIII plaintiff in contravention of the objectives of the Fair Housing Act as construed by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Petition for a Writ of Certiorari be granted to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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By _____
PER ANN HARDY

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to John A. Daniels and Jack Efrom, Attorneys for Defendant, at 2201 Tower Life Building, San Antonio, Texas 78205, on this 5th day of June, 1985.

_____
PER ANN HARDY

APPENDIX

Willie B. HACKETT,
Plaintiff-Appellant,

v.

The HOUSING AUTHORITY OF the CITY OF SAN ANTONIO, A Political and Corporate Body,
Defendant-Appellee.

No. 84-1057.

United States Court of Appeals,
Fifth Circuit.

Jan. 21, 1985.

Rehearing Denied March 7, 1985.

Landlord brought section 1988 action against city housing authority for allegedly discriminating against him on racial grounds in setting rents he could charge under a federal rent subsidy program. The United States District Court for the Western District of Texas, Fred Shannon, entered judgment in favor of city housing authority, and landlord appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) city housing authority's exhibit which represented results of studies that the authority conducted after the instant action was brought and which summarized data on several subsidized housing units in the area in question was inadmissible, and (2) erroneous admission of the exhibit did not require a new trial.

AFFIRMED.

Wiley, Garwood, Stolhandske & Simmons, James E. Conley, III, Per Hardy, San Antonio, Tex., for plaintiff-appellant.

Jack A. Efron, San Antonio, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas

Before GEE, WILLIAMS and JOLLY, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Willie B. Hackett appeals from a judgement that he take nothing on his claim, under 42 U.S.C. § 1983 (1982), that the San Antonio Housing Authority (SAHA) discriminated against him on racial grounds in setting the rents he could charge under a federal rent subsidy program. He contends that the district court committed reversible error in relying upon an exhibit the SAHA presented at the bench trial. We agree that the district court should not have considered the exhibit but hold that the record otherwise amply supports the finding of no discrimination. Accordingly, we affirm.[1]

I.

A. *The Section 8 Program*

Understanding the nature of Hackett's claim calls for inquiry into the United States Housing Act of 1937, 42 U.S.C.

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1. Hackett also complains that the district court should have found violations of the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1982), and the equal protection clause of the Fourteenth Amendment. The infractions that Hackett claims apparently would arise from the SAHA's assessment of his rents primarily on the basis of the location of his units in a predominantly black, low-income heighborhood. To the extent he is alleging intentional discrimination, we find no support for such an allegation in the record. Hackett neither produced evidence to show nor argued that the SAHA authorized lower rents for the Carson Homes area than for other neighborhoods in which fewer blacks lived. Thus, Hackett waived any such claim by failing to present it at trial. *See, e.g., Irby v. Sullivan,* 737 F.2d 1418, 1423 (5th Cir. 1984) ("Plaintiff may not raise a claim on appeal that he has not asserted below.") Moreoever, insofar as Hackett attacks as "analogous" to "red-lining" the SAHA's focus on his neighborhood in assessing reasonable rents, he states no claim that would entitle him to relief. Whatever injury he has suffered arose not from the SAHA's method of determining rents but from the apparently low value the rental market places on his property.

§§ 1437-1437j (1982), and the regulations that the Act generated. Section 8 of the Act contains the relevant provisions. That section authorizes the Secretary of Housing and Urban Development to contract with local public housing agencies (PHA's) for subsidies of low-income tenants' rental payments. 42 U.S.C. § 1437f(b) (1982). The PHA's, in turn, pass the assistance payments along to landlords pursuant to "assistance contracts", in which the PHA's and landlords join for that purpose. *Id.* Owners remain free to return their dwellings to the open market when their contracts expire. The assistance contracts must specify, however, the maximum monthly rent that the landlord may receive for each unit. *Id.* § 1437f(c)(1). The statute for the most part leaves to the Secretary the task of establishing regulations to guide the PHA's in assessing rental rates. *See id.* § 3535(d) (empowering Secretary to "make such rules and regulations as may be necessary to carry out his functions, powers, and duties").

The regulations set out two limitations on the rents that PHA's may allow owners to charge. The first restriction mandates that rents not exceed by more than ten percent the "fair market rent" that the Secretary establishes for each "area" (city, county, or similar locality) at least once a year. *See* 24 C.F.R. § 882.106(a) (1984). The regulations also establish a "rent reasonableness limitation," which provides as follows:

> (1) The PHA shall certify for each unit for which it approves a lease that the Contract Rent for each unit is:
>
> (i) Reasonable in relation to rents currently being charged for comparable units in the private unassisted market, taking into account the location, size, type, quality, amenities, facilities and management and maintenance service of each unit, and
>
> (ii) Not in excess of rents currently being charged by the Owner for comparable unassisted units.

Id. § 882.106(b) (1984). The regulations permit "annual" and "special" adjustments to rents but generally proscribe adjustments that "result in material differences between the rents charged for assisted and comparable (as defined in § 882.106(b)) unassisted units...." *Id.* § 882.108(b) (1984).

B. *Hackett and the Grounds for His Complaint*

Hackett started participating in the section 8 program in 1975. From 1961 through 1970, he had purchased approximately fifty structures that the United States had constructed in the 1940's to house military officers. The housing stood in the Carson Homes area, a predominantly black neighborhood on the eastern side of San Antonio, and the units ranged in size from one to four bedrooms. A broker who had managed the property in Hackett's absence offered at least some of the units in 1975 for section 8,

low-income tenants. In 1976, Hackett settled in the city, and he and his family undertook refurbishment of the units. They performed most of the work themselves, repairing various defects and installing new appliances, such as stoves and refrigerators. He or his wife often stayed in one of the units to provide management services.

The events that provoked this action began in 1981. In the early part of that year, Hackett perceived that SAHA inspectors had started to determine the rents he could charge section 8 tenants by comparing his units only to others in the surrounding, predominantly black neighborhood rather than also to similar units in other parts of San Antonio. He complained to the Department of Housing and Urban Development(HUD). HUD responded with a letter advising Hackett that HUD had found no basis for his grievance and stating that "the comparable rents do no support the rents you are asking." In April, Hackett informed the SAHA that an inspector, a white woman had approved one of his units for $260 despite her feeling that it warranted $290. The inspector's superior, a black man, arranged a meeting later that day with Hackett, his wife, and the inspector to discuss the matter. The inspector informed the Hacketts that she had applied the rent reasonableness limitation in 24 C.F.R. § 882.106(b), and that the SAHA could accordingly offer no more than $260. The supervisor indicated that he would follow her recommendation. Hackett refused the offer and decided to remove the unit from the program.

In June 1981, Hackett objected to SAHA's reductions of his section 8 rents, and he continued his complaints through the end of the year. He lodged another complaint with HUD but later withdrew it. In most instances, SAHA officials told Hackett that the regulations required them to compare his units with others in the Carson Homes area. SAHA inspectors and their superiors spent a good deal of time responding to Hackett's complaints through inspections, studies, and meetings, but they failed to satisfy his demands. Hackett consequently refused several of SAHA's rent offers but kept a number of his other units in the subsidy program.

In late 1981, the controversy between Hackett and the SAHA reached an impasse. In response to Hackett's rejection of an inspector's rent offers in November, Rod Fauser, SAHA's Chief Inspector for Leased Housing, conducted an investigation of Hackett's complaints. Fauser accompanied the inspector on a reinspection of two of Hackett's units. He also examined dwellings in the surrounding neighborhoods, consulted a real estate agent, and reviewed a study that another inspector had prepared on rents in the Carson Homes area. He concluded that the Carson Homes rents exceeded reasonable levels, and he recorded his findings in a memorandum to the Director of Leased Housing, M.E. Bass. The memorandum recommended specific dollar amounts for each of five unit sizes (according to number of bedrooms) in the area.

On December 3, 1981, Bass embodied Fauser's recommendation in a letter to Hackett and his wife. The letter responded to a meeting that Bass had held with the Hacketts. It stated that "rents for converted military barrack-type units in the Carson Homes area of San Antonio may be approved for Section 8 families in accordance with" Fauser's schedule. Bass advised the Hacketts that the SAHA would not renew their expired assistance contracts except at those rates. Bass did not send a copy of the letter or a similar document to other section 8 landlords in the Carson Homes area, nor did he present the schedule to owners of section 8 units in other parts of San Antonio. Hackett refused to accept Bass's offer but continued to participate in the program. Following various further controversies, Hackett filed this suit against the SAHA for damages, a declaratory judgment, and injunctive relief.

C. *Proceedings Below*

The district court tried the case without a jury. Hackett presented evidence showing that a white Carson Homes landlord, Joe L. Colebank, had received a $300 rate for a three-bedroom unit whereas Hackett had gotten the same rate for a larger unit just across the street. Hackett also demonstrated that the SAHA had set a rate of $231 for another white landlord for a Carson Homes two-bedroom unit that contained no stove or refrigerator. Hackett compared the rate on that unit with a $240 rate on his unit which had those appliances. He did not point out, however, what other amenities the white landlords provided. The remainder of his evidence consisted of documents and his testimony regarding his efforts to improve the area and his units, the services he provided, the quality and amenities of his units, and the nature of his clashes with SAHA officials.

The SAHA rebutted in part with an exhibit which was admitted into evidence over objection and which forms the basis of this appeal. Exhibit Z represented the result of studies that the SAHA conducted after Hackett brought this action. It summarized data on approximately 150 section 8 units in the Carson Homes and contiguous areas. The SAHA derived the data from assistance contracts with landlords, field inspection notes, and conversations with some section 8 unit owners. The exhibit provided information

on each unit according to owner, the owner's race, the address of the unit, the number of bedrooms, and the rental rate for the years 1980 through 1983. The exhibit showed that, on average, Hackett received more section 8 rent per unit than did all other non-black landlords.

In objecting to the admission of Exhibit Z, Hackett urged that the SAHA had not produced the documents that provided the data for the exhibit. That omission, he claimed, violated Fed.R.Evid. 1006, which conditions admissiblity of such summaries on the proponent's making available the material underlying the exhibit. Hackett also pointed out inaccuracies in Exhibit Z and further objected that the identification of the race of the owners was derived from hearsay. The district court nonetheless admitted the exhibit.

The court entered judgement for the SAHA, delivering its findings from the bench. The district judge said:

> [A] good lawyer cannot make a case when there isn't one and this "ain't" a discrimination case, and I find princip[al] support for this in Defendant's Exhibit Z, particularly the inter office memo [sic] of December 1, 1982, from Fauser to Bass. I rely upon it. I believe it is accurate and relevant.
>
> * * * * * *
>
> I believe that that last part of his study tells the entire tale, dated December 1, 1982. It focuses on Carson Homes—Rattlesnake Hill, the Ft. Sam Gateway target area, uses nine streets and appears to be professionally done.

The court also noted inaccuracies in Exhibit Z but held that they affected the weight rather than the admissiblity of the exhibit. The court denied Hackett's new trial motion, which challenged the court's reliance on Exhibit Z. Hackett appeals from that decision.

II.

Our review encompasses two issues: (1) whether the district court erred in admitting Exhibit Z, and, if so, (2) whether the court's reliance upon the exhibit requires a new trial. We consider the questions in turn.

A. *Admissibility of Exhibit Z*

[1] Fed.R.Evid. 1006 allows the admission into evidence of summaries of information but exacts a price: "The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place." Hackett timely demanded that the SAHA produce the documents from which Exhibit Z derived. The SAHA failed to do so, apparently because the original documents no longer existed. That failure rendered the exhibit inadmissible. *See United States v. Kim,* 595 F.2d 755, 764 (D.C.Cir. 1979) (approving district court's refusal to admit summary where underlying documents not available); 5 J. Weinstein & M. Berger, *Weinstein's Evidence* 1006[04], at 1006-10 (1983) (suggesting continuance of trial to allow inspection). The district court thus abused its discretion in receiving and considering Exhibit Z.

[2] We also find the exhibit at least in large part inadmissible on a further ground. The SAHA determined the race of each landlord it included in the summary from conversations with a few of the section 8 owners. As such, that information constituted inadmissible hearsay, which can form no part of a Rule 1006 summary *See, e.g., Soden v. Freightliner Corp.,* 714 F.2d 498, 506 (5th Cir. 1983) (upholding exclusion of charts on ground that they derived from hearsay); *Gordon v. United States,* 438 F.2d 858, 876 (5th Cir.), *cert. denied,* 404 U.S. 828, 92 S.Ct. 139, R.L.Ed.2d 56 (1971). Since excising the racial indicia from Exhibit Z would have vitiated its relevance in rebutting the claim of discrimination, the inclusion of hearsay in the exhibit made it largely irrelevant.[2]

2. The SAHA argues that we should affirm the admissibility of Exhibit Z under the residual hearsay exception in Fed.R.Evid. 803(5) or (24).

Even assuming that the hearsay—from the underlying documents and the statements from which the SAHA gleaned the racial backgrounds of owners—falls within the exceptions to the hearsay rule, both of them plainly require the sponsoring party to give pre-trial notice to its adversaries that it intends to invoke the exceptions. The SAHA does not suggest that it provided such notice.

that the SAHA treated him differently from non-black section 8 landlords. His was the burden of proof. Although Hackett demonstrated some basis for inferring discrimination, the SAHA overwhelmingly rebutted such an inference with evidence other than Exhibit Z.

The primary thrust of Hackett's presentation consisted of comparions between his units and the section 8 dwellings that two white landlords owned in the Carson Homes area. One of the white owners, Colebank, received $300 per month for a three-bedroom apartment very similar to a Hackett unit that stood just across the street. Hackett produced photographs of both structures, and he testified that the Colebank unit exhibited lower quality than his. He contended that the SAHA should have authorized him to charge more rent than Colebank.

The other white landlord, Wills, also owned a refurbished barracks-style unit in the neighborhood, and the SAHA permitted a monthly charge for it of $231. Hackett compared Wills's two-bedroom unit, which had no refrigerater or stove, with two of his units, which did have those appliances. He argued that the qualitative differences between his and Wills's units warranted more than the $240 per month that the SAHA offered for his apartments.

The district court, however, gave little weight to the comparisons. The court rejected outright the Colebank analogy, expressly crediting Fauser's testimony that the SAHA inspector had erred in authorizing Colebank to charge $300.[3] Referring to Hackett's evidence that the quality of his units exceeded that of Colebank's and Wills's, the court remarked as follows:

> I don't see it. I don't see it. I don't see it based on the photographs. I don't see it based on the numbers. I don't believe you are going to get much qualitative difference from these houses unless it is just out of the charity of your heart.

3. The court stated that "well, let me just say, I believe it was a mistake. I believe what Mr. Fauser said, because it is so consistent with everything else."

Discerning in them no clear error, we accept the court's factual findings. Fed.R.Civ.P. 52(a). Hackett thus failed to show to the district court's satisfaction a single instance, other than one instance of admitted error, in which the SAHA rates resulted in preference to non-black landlords.[4]

Evidence that the SAHA as well as Hackett himself introduced actually points in the opposite direction. Hackett's Exhibit 15, which embodied a SAHA inter-office memorandum of December 23, 1981, indicated that Hackett then received $5 more than Colebank did for one-bedroom units and $25 more for two-bedroom units. Exhibit 15 also showed Hackett's section 8 rents well exceeded the amounts that other participants in the program received for units of comparable size throughout San Antonio. Another set of documents, Exhibit DD, presented data as of December 1983 in the form of a computer print-out. Those data reflected that the SAHA had premitted Hackett to charge $13 more per month than Colebank for one-bedroom units, $40 more for two-bedrooms, and $10 more for three-bedrooms. Exhibit Z aside, the district court had before it a plenitude of evidence on which to ground its ultimate conclusion that Hackett had failed to show discrimination.

III.

Because evidence other than the inadmissible Exhibit Z sufficiently undergirded the district court's finding of no discrimination, we find no abuse of discretion in its refusal to grant a new trial.

AFFIRMED.

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4. Although the absence of explicit findings counsels caution, we also believe that the district court discerned little substance in Hackett's other evidence of disparate treatment. In finding no discrimination, the court implicitly rejected Hackett's contentions that the SAHA harassed him by inspecting his units more frequently than other landlords' dwellings and that the December 3 letter from Bass placed a ceiling only on the rents that Hackett could charge. Fauser testified that the ceiling provided guidelines rather than inflexible limits and that the rent schedule applied to all section 8 landlords who owned barracks-style units in the Carson Homes area. He also stated that the frequency of inspections responded to the more numerous complaints that Hackett lodged and that his tenants pressed against him. The court thus accepted the SAHA's explanation that it presented only Hackett with the December 3 schedule and often inspected his units not out of racial animus against him but in response to his grievances and those that others presented.

§ 882.106 Contract rents.

(a) *Fair Market Rent Limitation.* (1) The Gross Rent for any existing housing unit approved pursuant to § 882.209(f) shall not exceed the Fair Market Rent applicable to such unit on the date of Lease approval, except as provided in this paragraph (a).

(2) For up to 20 percent of the units authorized by an ACC, the PHA may approve Gross Rents on a unit-by-unit basis which exceed the applicable Fair Market Rents by up to 10 percent. The PHA may, in addition, exercise such authority with respect to more than 20 percent of the units authorized by an ACC if HUD approves such extension of the PHA's authority. In considering whether to grant such approval, HUD will review the appropriateness of the applicable Fair Market Rents and the relationship of estimated programs costs to program objectives.

(3) HUD may approve, upon request from a PHA, maximum Gross Rents for all units of a given size or type (elevator/nonelevator) of up to 20 percent above the applicable Fair Market Rents within a designated municipality, county or similar locality. Any such request must be supported by a statement of the special circumstances warranting such increase in maximum Gross Rents including whether such higher rents are necessary to implement a Housing Assistance Plan. In considering whether to grant such approval, HUD will review the appropriateness of the applicable Fair Market Rents and the relationship of estimated program costs to program objectives. In no event shall a maximum Gross Rent, as approved under this paragraph, exceed the rent, including Allowances for Utilities and Other Services, determined by HUD to be the average rent currently being charged for available standard units of similar size or type in the applicable municipality or county.

(4) On the basis of a showing by the PHA that (i) special circumstances apply to units of a given size or type limited to a specified neighborhood, (ii) by reason of these circumstances the reasonable Gross Rents for such units are as high as 20 percent above the applicable Fair Market Rents, and (iii) the units cannot be rented for less, HUD may authorize the PHA to approve Gross Rents for such units up to 20 percent above the applicable Fair Market Rents. On the basis of a showing by the PHA that (iv) the leasing of a certain unit is necessary to meet the unique needs of particular Family, (v) the reasonable Gross Rent for the unit is as high as 20 percent above the applicable Fair Market Rent, and (vi) the unit cannot be rented for less, HUD may authorize the PHA to approve a Gross Rent for that unit up to 20 percent above the applicable Fair Market Rent. Authorization under this paragraph (a)(4) shall be based upon substantially the same criteria as under paragraph (a)(3) of this section except for the last sentence thereof.

(b) *Rent Reasonableness Limitation.*

(1) The PHA shall certify for each unit for which it approves a lease that the Contract Rent for such unit is:

(i) Reasonable in relation to rents currently being charged for comparable units in the private unassisted market, taking into account the location, size, type, quality, amenities, facilities and management and maintenance service of such unit, and

(ii) Not in excess of rents currently being charged by the Owner for comparable unassisted units.

(2) For a rent controlled unit, comparable units shall be those which are rent controlled; for a unit which is not subject to rent control, comparable units shall be those which are not rent controlled.

(3) The PHA shall maintain for three years all certifications and relevant documentation under this paragraph (b) for inspection by HUD.

(c) *Congregate Housing and Independent Group Residences.*

(1) The Fair Market Rent for each congregate housing unit shall be the same as for 0-bedroom units, except that, if the unit consists of two or more private rooms, the Fair Market Rent shall be the same as for a 1-bedroom unit.

(2)(i) The Fair Market Rent for an Independent Group Residence shall be the Fair Market Rent, applicable to the unit size being leased, for example, a 4-bedroom unit if the residence contains 4 bedrooms.

(ii) The PHA shall issue a Certificate of Family Participation to each eligible Family which will reside in an Independent Group Residence. A separate Lease and Contract shall be executed for each such Family. A Resident Assistant who lives in the unit may be counted as a Family member in determining the appropriate number of bedrooms. However, the Resident Assistant's income shall be disregarded in determining the Total Tenant Payment, the Tenant Rent or the Family's income eligibility.

(3) For purposes of determining the housing assistance payment for each individual participating in the Section 8 Existing Program, the PHA shall allocate the Gross Rent, which is subject to paragraphs (a) and (b) of this section, among the total number of occupants in the Independent Group Residence in an equitable manner which ensures that the Gross Rents of

occupants (other than the resident Assistant(s), if any, occupying no more than 1-bedroom) not receiving Section 8 assistance are not subsidized.

To determine the portion of the Gross Rent to be allocated to each individual receiving Section 8 assistance, the Gross Rent is divided by the total number of occupants in the Independent Group Residence other than the Resident Assistant(s), if any, who will occupy no more than 1-bedroom. For example, if three Section 8 recipients and a Resident Assistant reside in a 4-bedroom unit, the housing assistance payment for each of the Section 8 recipients would be based on ⅓ of the Gross Rent. Likewise,if two Section 8 recipients, a Resident Assistant and a person not receiving Section 8 assistance reside in a 4-bedroom unit, the housing assistance payments for each of the Section 8 recipients would be based on ⅓ of the Gross Rent; the person not receiving Section 8 assistance would pay ⅓ of the Gross Rent. However, if a Section 8 recipient, a person not receiving Section 8 assistance, and two Resident Assistants each occupy a bedroom in a 4-bedroom unit, the housing assistance payment for the Section 8 recipient would be based on ⅓ of the Gross Rent and one of the Resident Assistants would be considered a person not receiving Section 8 assistance since this section prohibits Section 8 assistance being contributed toward more than 1-bedroom for the housing costs of the Resdent Assistant(s). In all of these examples the Fair Market Rent for the Independent Group Residence would be that of a 4-bedroom unit.

(4) In determining the reasonableness of the rents, consideration shall be given to the presence or absence of common rather than private cooking, dining and sanitary facilities and the provision of special amenities or maintenance and/or management services. The Contract Rent shall not include the cost of providing supportive services, housekeeping or laundry services, furniture, food, or serving food.

(Sec. 8, United States Housing Act of 1937 (42 U.S.C. 1437f); sec. 326(e) of the Housing and Community Development Amendments of 1981 (Pub. L. 97-35); and sec. 7(d),

Department of Housing and Urban Development Act (42 U.S.C. 3535(d)))

[43 FR 61246, Dec. 29, 1978, as amended at 49 FR 12237, Mar. 29 1984]

EFFECTIVE DATE NOTE: At 49 FR 12237, Mar. 29, 1984, in § 882.106, paragraphs (a)(1) and (c)(2)(ii) were revised, effective May 10, 1984. For the convenience of the user, the superseded text is set forth below:

§ 882.106 Contract rents.

(a) *Fair Market Rent Limitation.* (1) The Gross Rent for any Existing Housing unit approved pursuant to § 882.210(b) shall not exceed the Fair Market Rent applicable to such unit on the date of Lease approval, except as provided in this paragraph (a).

* * * * *

(c)* * *

(2)* * *

(ii) The PHA shall issue a 0-bedroom Certificate of Family Participation for each eligible individual who will reside in an Independent Group Residence and a separate Lease and Contract shall be executed. A Resident Assistant(s) who resides in the unit may be considered a Family member for purposes of determining the appropriate unit size. However, the Resident Assistant's income shall be disregarded for purposes of determining the Gross Family Contribution and the Family's income for eligibility for housing assistance. Notwithstanding the requirements specified above, if an eligible individual wishes to move, the PHA may then issue that individual a 1-bedroom Certificate, if appropriate, in accordance with § 882.209(a)(2).

* * * * *

§ 882.108 Rent adjustments.

(a) Contract Rents shall be adjusted as provided in paragraphs (a)(1) and (2) of this section upon request to the PHA by the owner. However, the unit must be in Decent, Safe and Sanitary condition and the owner must otherwise be in compliance with the terms of the lease and the Contract. Subject to the foregoing and § 882.106(b) (the rent reasonableness limitations) adjustments to Contract Rents shall be as follows:

(1) *Annual Adjustments.* (i) Annual adjustments as of any anniversary date shall be determined by using the applicable Section 8 Annual Adjustment Factor (24 CFR Part 888) most recently published by HUD in the FEDERAL REGISTER.

(ii) Contract Rents may be adjusted upward or downward, as may be appropriate. However, in no case shall the adjusted rent be less than the Contract Rent on the effective date of the Contract.

(2) *Special Adjustments.* A special adjustment, subject to HUD approval, to reflect increases in the actual and necessary expenses of owning and maintaining the unit which have resulted from substantial general increases in real property taxes, utility rates or similar costs (i.e., assessments, and utilities not covered by regulated rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by the annual adjustments provided for in paragraph (a)(1) of this section. The Owner shall submit financial statements to the PHA which clearly support the increase.

(b) *Overall Limitation.* Notwithstanding any other provisions of this part, adjustments as provided in this section shall not result in material differences between the rents charged for assisted and comparable (as defined in § 882.106 (b) unassisted units, as determined by the PHA (and approved by HUD in the case of adjustments under paragraph (a)(2) of this section).

(Sec. 8, United States Housing Act of 1937 (42 U.S.C. 1437f); sec 326(e) of the Housing and Community Development Amendments of 1981 (Pub. L. 97-35); and sec. 7(d), Department of Housing and Urban Development Act, (42 U.S.C. 3535(d)))

[43 FR 61246, Dec. 29, 1978, as amended at 44 FR 43903, July 26, 1979; 47 FR 4252, Jan. 29, 1982; 47 FR 33500, Aug. 3, 1982; 49 FR 12237, Mar. 29, 1984]

EFFECTIVE DATE NOTE: At 49 FR 12237, Mar. 29, 1984, in § 882.108, paragraph (a)(1)(i) was revised, effective May 10, 1984. For the convenience of the user, the superseded text is set forth below:

§ 882.108 Rent adjustments.

(a)* * *

(1) *Annual Adjustments.* (i) Notwithstanding any Contract provisions to the contrary, annual adjustments as of any anniversary date shall be determined as follows:

(A) For a Contract entered into on or after January 29, 1979, the applicable Section 8 Annual Adjustment Factor (24 CFR part 888) most recently published by HUD in the FEDERAL REGISTER;

(B) For a Contract entered into before January 29, 1979, the greater of the percent change in the applicable published Existing Housing Fair Market Rent (with appropriate reduction in the adjustment where utilities are paid directly by the Family); or the applicable Annual Adjustment Factor;

85-226

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1984

WILLIE B. HACKETT,

Petitioner,

v.

HOUSING AUTHORITY OF THE CITY OF SAN ANTONIO, TEXAS A BODY POLITIC AND CORPORATE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION

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STATUTES:

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No. .....

—o—

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—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

JURISDICTION

1. Respondent Does Not Contest Jurisdiction Of The Petition For Writ Of Certiorari.

—o—

STATEMENT OF THE CASE

From 1961 through 1970, Petitioner Willie B. Hackett purchased a number of army barrack style buildings in the Carson Homes area of San Antonio, Texas (R. Vol. 1, 28), a predominantly black neighborhood. In 1975, Petitioner began participation in the Section 8 housing program run

by the Housing Authority of the City of San Antonio (hereinafter referred to as "SAHA") (R. Vol. 1, 32), having converted these barracks into apartments ranging from one bedroom to five bedroom units. The Section 8 program allows a landlord to rent to otherwise impoverished persons with the difference between what the tenant can pay and the rental value of the unit being subsidized by SAHA. (*Hackett v. Housing Authority of the City of San Antonio,* 750 F.2d 1308 at 1310). A landlord voluntarily places property in the program, after which SAHA determines the rental value of the property and sets a rental maximum it will pay and a base rental the tenant must pay in accordance with the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437J and its regulations (*Hackett v. Housing Authority,* 750 F.2d at 1310).

In 1981, Petitioner perceived he was the subject of discriminatory action by SAHA regarding his property's rental value as set by SAHA which correspondingly caused the SAHA rental payments to him to decrease. (*Hackett v. Housing Authority,* 750 F.2d at 1310).

Petitioner alleged two types of discrimination by SAHA. First, that SAHA was allowing white landlords to receive more for their property than he was allowed, even though the units were close in proximity and size. Second, that the overall rental values placed on units in the Carson Homes area was discriminatorily low as compared to the rent of San Antonio. (*Hackett v. Housing Authority,* 750 F.2d at 1310).

On May 4, 1982, Petitioner filed suit against SAHA in the United States District Court for the Western District of Texas. The case was tried before the Court with-

out a jury. At the conclusion of that trial, the Trial Judge found no evidence of discriminatory action by SAHA, and entered a take nothing judgment. (R. Vol. 2, 97).

Part of the evidence presented by SAHA during the trial included an informal compilation of rental rates gathered by SAHA, mainly through talking with persons living or renting homes in the Carson Homes area. (R. Vol. 1, 6). This set of documents, identified as Defendant's Exhibit "Z" was objected to by Petitioner. (R. Vol. 1, 5-9).

While the trial court admitted the possibility of errors, it nonetheless admitted Exhibit "Z", stating the existence of errors or hearsay in the exhibit would go to its weight, and not admissibility. (R. Vol. 1, 5).

After hearing all the evidence, the Trial Judge stated, as to Exhibit "Z", that he relied upon it as revelant, particularly a SAHA interoffice memo which was contained as part of Exhibit "Z". (R. Vol. 2, 92). The judge then spent considerable time detailing rental rates gleaned solely from in-court testimony. (R. Vol. 2, 92-97). After comparing these rental rates and statistics, neither of which were objected to during trial by Petitioner, the trial judge determined that not only was there no showing of discrimination by SAHA, but if anything, Petitioner came out financially ahead in most areas. (R. Vol. 2, 95-97). A motion for new trial was denied, on December 23, 1983.

Petitioner thereafter appealed the District Court's ruling to the United States Court of Appeals, Fifth Circuit, arguing that the judgment was invalid because the court had "relied" upon inadmissible evidence. (*Hackett v. Housing Authority,* 750 F.2d at 1311).

The United States Court of Appeals, Fifth Circuit, ruled that Exhibit "Z" was inadmissible, and the District Court abused its discretion in receiving and considering it. (*Hackett v. Housing Authority*, 750 F.2d at 1312). However, the court ruled that the error was harmless in that even after Exhibit "Z" was removed from the case, there was still more than sufficient competent evidence to support the judgment. (*Hackett v. Housing Authority*, 750 F.2d at 1313).

Petitioner has raised two issues for review. First, Petitioner claims the abuse of discretion found by the Court of Appeals should not be allowed as harmless error, and that to so allow, contradicts the holdings of this court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Secondly, Petitioner contends that the Court of Appeals imposed an insurmountable burden of proof upon Petitioner by requiring him to provide direct evidence of discrimination by SAHA in contradiction to this court's holding in *Aikens*.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. The Decision By The Trial Court Was Supported By A Plentitude Of Admissible Evidence From Which That Judgment Should Be Upheld.

Petitioner gives great and exclusive weight to the statement by the trial judge that he relied upon Defendant's Exhibit "Z" when making his final decision. *Peti-*

tion for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, pp. 8-9 (hereinafter referred to as "Petitioner's Petition"). However, Petitioner fails to mention that the same trial court, while acknowledging the consideration of Exhibit "Z", further stated that it had relied *particularly* on a SAHA interoffice memorandum included therein. (R. Vol. 2, 92). This interoffice memorandum was tendered into evidence as Plaintiff's Exhibit 15 by Petitioner. (R. Vol. 1, 43-44).

The United States Court of Appeals, Fifth Circuit, determined that SAHA's Exhibit "Z" was in fact inadmissible evidence, and the receiving and consideration of same by the trial court constituted an abuse of discretion. *Hackett v. Housing Authority*, 750 F.2d at 1312. Respondent SAHA does not contest that determination here. Respondent asserts, however, that the Court of Appeals correctly stated that even without Exhibit "Z", Respondent overwhelmingly presented more than enough admissible evidence to rebut the prima facia case established by Petitioner. *Hackett v. Housing Authority*, 750 F.2d at 1313.

Respondent contests the implication by Petitioner that Exhibit "Z" was the *only* evidence considered by the trial court to sustain its ultimate ruling in favor of Respondent. In the Petition for Writ of Certiorari the trial court is portrayed as relying solely upon Exhibit "Z". The Circuit Court of Appeals, Fifth Circuit, found otherwise, and stated:

> "Erroneous receipt of evidence in bench trials undermines rather than destroys the judgment: In a nonjury case, the admission of incompetent evidence will not warrant reversal *unless all of the competent evidence is insufficient to support the judgment*, or un-

> less it affirmatively appears that the incompetent evidence induced the Court to make an essential finding which would otherwise not have been made."

Hackett v. Housing Authority, 750 F.2d at 1313 (emphasis added).

Utilizing the rule quoted above, the Court of Appeals in essence determined that there was competent evidence other than Exhibit "Z" to support the judgment.

2. The Court Of Appeals Did Not Sanction Reliance Upon Inadmissible Evidence, But Rather, Found That Such Acceptance Of Inadmissible Evidence Was Not Reversible Error In This Instance Because Of Other Admissible Evidence Produced By SAHA Upon Which The Ultimate Decision Could Be Sustained.

The Court of Appeals affirmatively found that the consideration of Exhibit "Z" by the trial court was an abuse of discretion. *Hackett v. Housing Authority,* 750 F.2d at 1312. The Court of Appeals did state, however, that ". . . exclusion of Exhibit "Z" would not have altered the District Court's finding that the SAHA did not discriminate against Hackett . . ." *Hackett v. Housing Authority,* 750 F.2d at 1313. The Court of Appeals reasoned:

> "In reviewing, fully-tried discrimination cases, we focus on determining the viability of the District Court's ultimate conclusion regarding the presence or absence of discrimination . . . Although Hackett demonstrated some basis for inferring discrimination, the SAHA overwhelmingly rebutted such an inference with evidence other than Exhibit "Z".

Upon review, the issue is not what evidence the trial court cited as reliable, but rather the entirety of evidence

presented and whether such evidence was sufficient to sustain judgment. Upon a thorough review of the entire record, the Court of Appeals determined sufficient evidence did exist.

3. Petitioner Did Not Sustain His Burden Of Proof At The Trial Level As Outlined By McDonnell Douglas Corp. v. Green.

The issues raised by Petitioner rest primarily upon the similarity between Title VII employment discrimination cases and the current Title VIII discrimination matter. *Petitioner's Petition,* p. 14. Specifically, Petitioner lays great weight on the holdings by this court in *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089 (1981), both of which are Title VII cases.

In *Aikens,* this court held that once a Plaintiff in a discrimination suit establishes a prima facia showing of discrimination, the defendant can rebut that inference with admissible evidence only. *Aikens,* 103 S.Ct. at 1480. *Burdine* held that ". . . the defendant must clearly set forth, through the introduction of admissible evidence," the reasons for defendant's actions. *Burdine,* 101 S.Ct. at 1094.

Respondent agrees with Petitioner that the similarities between Title VII and Title VIII discrimination actions are such as to make distinctions between appropriate standards impracticable. However, Petitioner fails to realize that both *Aikens* and *Burdine* were determined by a burden of proof doctrine first enunciated by this court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93

S.Ct. 1817 (1973). This doctrine was explained by Mr. Justice Powell in *Burdine* where he wrote in relation to a Title VII case:

> ". . . the basic allocation of burdens and order of presentation of proof in a (discrimination) case is as follows: First, the Plaintiff has the burden of proving by a preponderance of the evidence a prima facia case of discrimination. Second, if the Plaintiff succeeds in proving the prima facia case, the burden shifts to the Defendant to articulate some legitimate nondiscriminatory reason for the employee's rejection . . . Third, should the Defendant carry this burden, the Plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Defendant were not true reasons, but were a pretext for discrimination."

Burdine, 101 S.Ct. at 1091.

SAHA does not contest the finding by the Court of Appeals that Petitioner established a prima facia case. *Hackett v. Housing Authority*, 750 F.2d at 1313 (" . . . Hackett demonstrated some basis for inferring discrimination . . ").

Once the Court of Appeals determined that a prima facia case had been established, it then focused its attention on steps two and three of *McDonnell Douglas*, which shifted the burden of persuasion upon the Defendant to articulate its nondiscriminatory reasoning behind its action, and the final stage where a Plaintiff must show this reasoning is pretextual.

As Mr. Justice Powell stated in *Burdine*, once the prima facia case is established and the burden of explanation shifts unto the Defendant, " . . . It is sufficient if the

Defendant's evidence raises a genuine issue of fact as to whether it discriminated against the Plaintiff. To accomplish this, the Defendant must clearly set forth, through the introduction of admissible evidence, the reasons for . . ." the actions taken. *Burdine,* at 101 S.Ct. at 1094.

SAHA asserts, and the Court of Appeals found, that SAHA had produced sufficient admissible evidence to rebut the prima facia showing. *Hackett v. Housing Authority,* 750 F.2d at 1313 (" . . . the SAHA overwhelmingly rebutted such an inference with evidence . . ."). Preeminent among this evidence produced by SAHA during the trial was a SAHA interoffice memorandum, dated December 23, 1981 (introduced by Petitioner) indicating that he received more money for certain units than did a neighboring white landlord, and a set of computer print-outs which again showed that Petitioner received more average money for his units than did other landlords, white or black. *Hackett v. Housing Authority,* 750 F.2d at 1314. And again, the fact that this, and other evidence, was not affirmatively cited by the trial court as was Exhibit "Z" does not mean that this evidence did not exist or was not considered by the trial court in formulating its ruling.

When SAHA sufficiently rebutted the inference of discrimination, the burden was then placed back upon the Petitioner to carry through with proving his case. *Burdine,* 101 S.Ct. at 1095:

> "(The Plaintiff) must now have the opportunity to demonstrate that the proffered reason was not the true reason . . . (He) may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered ex-

planation is unworthy of credence. See *McDonnell Douglas*, 411 U.S. at 804-805, 93 S.Ct. at 1825-1826."

The Court of Appeals found, upon careful examination of the entire record, that Petitioner failed to carry out this third leg of the *McDonnell Douglas* test in that the Court of Appeals could cite no evidence presented by Petitioner aimed at showing the nondiscriminatory reasons proffered by SAHA were pretextual. When this final, and ultimate burden was not fulfilled, Petitioner's case failed. See *Aikens*, 103 S.Ct. at 1483 (" . . . the *McDonnell Douglas* framework requires that a Plaintiff (only) prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision.") In essence, the Petitioner raised a rebuttal inference which, when rebutted, raised " . . . the factual inquiry . . . to a new level of specificity" (*Burdine*, 103 S.Ct. at 1095), a level to which Petitioner never climbed.

4. The Court Of Appeals Did Not Require Petitioner To Present Direct Evidence Of Discriminatory Intent, But Rather, Required Him To Directly Address The Issue Of Discrimination With Evidence.

The last claim upon which Petitioner seeks review is based upon his determination that when the Court of Appeals stated, "A thorough review of the record shows that Hackett produced no direct evidence of intentional discrimination . . .," that the court was requiring direct evidence of discriminatory intent contradictory to the holding of this court in *Aikens*.

Aikens holds that because of the difficulty inherent in trying to prove a person's mind and intent, a discrimination Plaintiff should not be required to present direct evidence of intent. *Aikens*, 103 S.Ct. at 1482-1483. But, the burden of proof remains on the Plaintiff to present evidence *directly related* to the central issue of discrimination.

SAHA asserts that when the Court of Appeals stated that Petitioner had not produced direct evidence of intentional discrimination, the court meant that he had not presented any evidence directly related to the issue of discrimination which went beyond the rebutted prima facia showing.

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CONCLUSION

Respondent presented more than enough unanswered, admissible evidence of nondiscriminatory, legitimate action in its dealings with Petitioner that was sufficient to sustain the ruling of the trial court, in spite of the inadmissibility of SAHA's Exhibit "Z". Further, Petitioner was not required by any court addressing this case to present direct evidence of discriminatory intent, but was only required to carry his ultimate burden of proof, which he did not do after Respondent rebutted the prima facia case.